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In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. . . . . .

THE LOCKE MACHINE COMPANY,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment entered by the United States Circuit Court of Appeals for the Sixth Circuit, on May 17, 1948, in cause No. 10,577 on the docket of said court, wherein said court affirmed, 168 F. (2d) 21 (R. 151, 153) the decision of the Tax Court of the United States, 6 TCM 294, CCH Dec. 15,678(M) (R. 128-41), determining against petitioner a deficiency in income and excess profits taxes.

The case presents a problem of statutory construction; it raises the question, never heretofore passed upon, whether there is any basis for the power the Commissioner has come to exercise, of fixing the compensation an employer will be permitted to pay.

JURISDICTION.

This Court has jurisdiction to review said judgment under Sections 1254(1) and 2101(c) of the new Judicial Code, effective September 1, 1948.

The judgment was entered May 17, 1948 (R. 151). Petition for rehearing (R. 159), duly filed, was denied June 21, 1948 (R. 171).

STATUTE INVOLVED.

The case turns on Internal Revenue Code Section 23(a)(1)(A), which reads:

> "**Sec. 23. Deductions from Gross Income.** In computing net income there shall be allowed as deductions:
>
> (a) EXPENSES.—
>
> (1) TRADE OR BUSINESS EXPENSES.—
>
> (A) IN GENERAL.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *."

STATEMENT OF FACTS.

The Tax Court determined a deficiency in income and excess profits taxes for the year 1941 (R. 128-41).

The Circuit Court of Appeals affirmed (R. 153).

The additional tax results from disallowance, as an expense in computing income subject to tax, of part of the compensation paid by the company to four officers and employees (R. 128, 139). There is no claim that what the company paid was not compensation or that it should be disallowed on any ground save only that the company paid too much. The sole ground of the disallowance was that the company paid "excessive compensation" (R. 10, 129, 133, 139).

The compensation paid consisted of modest base pay, which is not questioned, plus a year-end bonus (R. 29) determined in accordance with a plan instituted in 1927 (R. 25, 131), modified in 1928, 1929 and 1930 (R. 26-7, 131), placed on a percentage basis in 1931 (R. 27, 131-2), and thereafter continued in effect unchanged, save only for a downward revision in 1941 (Ex. 4-D, R. 25-8, Ex. 5-E, R. 29, 131-2).

Under the plan, after setting aside an amount equal to 10% of the outstanding stock, the following percentages of earnings were to be paid as a bonus (R. 27-8, 132):

Employee	Percentage
Elbert H. Baker, Jr., Vice President and General Manager	9%
Edward C. Sinclair, Plant Superintendent	8
J. E. Tomer, Secretary and Assistant Treasurer	7
Otto Gammel, Office Manager	5

This plan had been in effect since 1931 except that Baker, Sinclair and Tomer initially were the only participants and their percentage participations were, respectively, 10, 9 and 8 percent (R. 131-2). In 1941 the plan was extended to cover Otto Gammel (R. 27-8, 132). To make provision for him, the three, who had been participants since the commencement of the bonus plan, surrendered each one percentage point, making their participation 9, 8 and 7 percent, and Gammel 5% as above set forth[1] (R. 27-8, 132). It is not claimed that this division bore any relationship to stock ownership. While Baker owned a substantial stock interest, the other three involved owned each but 10 shares

[1] To compensate for the surrender by each of the three of one percentage point, an upward adjustment was made in base pay (R. 56). As it turned out, Sinclair and Tomer received in 1941 less than they would have received had no such adjustment been made. The total compensation which would have been payable to the three, had no change been made, as compared with the amount actually paid, was (R. 130, Ex. 12, R. 127):

	Effect of Change in 1941		
Employee	Total Paid in 1941	Amount Called for under 1931 Plan	Difference
Baker	$29,039	$25,198	$3,841
Sinclair	17,399	18,358	— 959
Tomer	14,999	16,079	— 1,080
		Net change	$1,802

out of a total of 675, increased at the end of the year to 27 each out of the 726 shares then outstanding (Ex. 8-H, R. 34).

The amounts paid including base pay and bonus, the amounts allowed by the Commissioner and by the Tax Court (affirmed by the Circuit Court of Appeals), and the amounts disallowed (omitting cents) were (Ex. 5-E, R. 29, 129, 130, 139):

	Total Compensation Paid			Amounts Allowed by		
Employee	Base Pay	Bonus	Total	Commissioner	Tax Court (affirmed by Circuit Court)	Disallowed
Baker	$15,000	$14,039	$29,039	$16,000	$16,000	$13,039
Sinclair	4,920	12,479	17,399	9,000	10,000	7,399
Tomer	4,080	10,919	14,999	8,000	8,000	6,999
Gammel	2,760	7,799	10,559	3,500	7,500	3,059
Totals	$26,760	$45,236	$71,996	$36,500	$41,500	$30,496

All of these men had been with the company for many years, Baker for 23, Sinclair for 14, Tomer for 20, and Gammel for 8 (R. 130-1). They stayed with the company in reliance upon the assurance that if they built up the business they would be compensated through the bonus plan in proportion to the success of their efforts (R. 47-9, 79, 101-2, 107-10, 119, 121-2).

If the Commissioner now may deny what was promised, these men will have given the best years of their lives at the cost of a crushing burden laid upon the company they have struggled to make a success in a fiercely competitive field.[2] For the effect of the decision upon this company, see R. 167-9.

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[2] The company is engaged in the business of manufacturing bicycle coaster brakes, which it sold to Sears Roebuck, and which accounted for 53% of its business, out of total sales of $715,000, and in the manufacture of other screw machine products, such as pieces for the automotive trade, refrigerator parts, gear blanks, and like items, which it turned out for various manufacturers (R. 129, Ex. 7-G, R. 32-3, 130, 90, 105-6).

QUESTIONS PRESENTED.

The questions presented are:

1. Does the Commissioner or Tax Court have any power under Internal Revenue Code Section 23(a)(1)(A), which authorizes deduction of

> "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered,"

to disallow any part of a payment conceded to be compensation?

2. Does the statute bestow the power where the payment is made in good faith pursuant to a plan which has been in effect for many years and in reliance upon which the services have been rendered?

3. If the statute, properly read, does bestow the power, may the question whether the compensation paid was "reasonable" be made to turn on (a) the source of the earnings, (b) the need of the United States for revenue, or (c) upon a different rule in wartime?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The writ should issue to settle important questions of federal law which have not been but should be decided by this Court, in that:

1. Whether the statute bestows the power the Commissioner has exercised, to disallow compensation paid in good faith, has never been passed upon by this Court. It has never been passed upon by *any* court save in this litigation.

The statute, which now is Internal Revenue Code Section 23(a)(1)(A), originally authorized deduction of "All

the ordinary and necessary expenses"[3] of carrying on a business. This obviously embraced compensation payments. To this all-inclusive provision, the Revenue Act of 1918 added the words here in question:

> "including a reasonable allowance for salaries or other compensation for personal services actually rendered."

As Dean Griswold has demonstrated[4] this was not designed to cut down a deduction the taxpayer otherwise would have had; it was put into the statute to give to the taxpayer a deduction he otherwise would *not* have had by giving him the benefit of "a reasonable *allowance*" for salaries where, as in the case of small family businesses, none had been paid.

However, the reason for the change having been forgotten, the Commissioner has come to treat the statutory provision as a limitation on all compensation payments. He has freely substituted his judgment for that of the employer as to what it is reasonable to pay, even where, as here, what was paid is conceded to be compensation paid in good faith pursuant to a plan of many years' standing. And, while there are cases by the bushel—although none in this Court[5]—where the courts have passed upon the Commissioner's compensation disallowances, the question whether the power was ever granted has gone by default.

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[3] Emphasis supplied throughout.

[4] NEW LIGHT ON "A REASONABLE ALLOWANCE FOR SALARIES," 59 Harvard Law Review 286. See also THE DEDUCTION OF "A REASONABLE ALLOWANCE FOR SALARIES"—THE UNDEFINED POWER OF THE COMMISSIONER, 56 Harvard Law Review 997.

[5] *Botany Worsted Mills v. United States* (1929), 278 U. S. 282, which did deal with compensation disallowances, arose before the language here in question was written into the statute and did not raise the present question. "We do not find it necessary to determine," said the Court, whether the amounts paid may be disallowed (p. 292) "merely because, and to the extent that, as compensation, they are unreasonable in amount." There the taxpayer failed because the money paid (p. 293) "was not in fact compensation for their services * * *."

Save in this case no court[6] has been called upon to examine the question whether the statute, properly read, grants the power. Instead, it has been *assumed* that the statute grants the power and the cases disposed of by examining only whether the amount paid was or was not in fact reasonable.

The question obviously is of enormous importance. If the statute does not bestow the power, the Court should stop its exercise, just as it would any other unwarranted seizure of arbitrary power.

2. If the statute does bestow the power, the Court should say by what tests the exercise of the power is to be measured. This Court has never laid down the controlling principles. It has never had occasion to do so. The last compensation case this Court had was *Botany Worsted Mills v. United States* (1929), 278 U. S. 282, which, as has been pointed out (in Note 5 on the opposite page) arose before the statute contained the provision for "a reasonable allowance."

How important it is that the governing principles be made clear, may be seen from the fact that nearly 10% of the cases filed in the Tax Court relate to compensation deductions, constituting the largest single class of litigation before the court.[7]

How sorely needed guidance is may be seen also from this case, where the Tax Court disallowed what was paid, not on the ground that it was not compensation, but because of the Tax Court's belief, in which the reviewing court saw nothing to criticize, that the reasonableness of what was paid could be made to turn on:

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[6] Except the Tax Court in *Walts, Inc.*, 6 TCM 22, CCH Dec. 15,566(M), January 17, 1947, where the point of a want of power was made but ruled against the taxpayer.

[7] The Commerce Clearing House Tax Court Petitions Index shows that, in the period from May 28, 1945 through March 8, 1948, 9,250 petitions were filed in the Tax Court (docket Nos. 8,251 through 17,500). Of these, 913 or 9.8% are classified in the index as dealing with compensation.

(a) **Source of the earnings**, the Tax Court erroneously considering the payments to be "based upon abnormal war profits" (R. 137).

The Tax Court was twice wrong: (1) the company had no "war" earnings whatsoever, but, even if it had, (2) Congress has not, except in the Renegotiation Act, made the test of what an employer may pay turn on the source of his profits.

(b) **Need of the United States for revenue**, the Tax Court erroneously considering that, if the payments be allowed (R. 138), "the Government, at a time when it needs tax income most vitally, will be unjustly deprived of such income."

Surely the compensation an employer may pay cannot be made to turn on the "need" of the United States. In any event Congress has not said so.

(c) **A different rule in wartime**, the Tax Court erroneously considering that (R. 134) "there is a vast difference between unusual profits which may sporadically befall * * * and * * * enormous profits * * * in a world-wide military conflict."

The Tax Court was thrice wrong: (1) the "enormous profits" were 7.52% on sales as compared with 7.27% in the two preceding years (Ex. 7-G, R. 32-3), (2) the earnings were no more warlike than a bicycle coaster brake sold to Sears Roebuck, which accounted for 53% of the company's earnings (Ex. 7-G, R. 32-3), refrigerator parts, terminals for street car rails, and like items (R. 90, 105-6) and (3) except in the Renegotiation Act, Congress has not made the taxpayer's rights turn on war conditions.

This Court has never passed upon the question whether the statute grants the power the Commissioner has exer-

cised, nor has the Court ever had occasion to consider the principles which shall control if the Commissioner does have the power. They should be examined.

The writ should issue.

Respectfully submitted,

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September 13, 1948.

In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

THE LOCKE MACHINE COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The writ should issue to determine whether Internal Revenue Code Section 23(a)(1)(A) bestows power upon the Commissioner to disallow compensation paid in good faith pursuant to a plan of long standing, and, if it does, to define the bounds of that power and the principles controlling its exercise.

OPINIONS BELOW.

The opinion of the Tax Court (R. 128-41) is reported in 6 TCM 294, CCH Dec. 15,678(M).

The opinion of the Circuit Court of Appeals (R. 153) is reported in 168 F. (2d) 21. Petition for rehearing (R. 159) was denied without opinion on June 21, 1948 (R. 171).

JURISDICTION.

As noted in the petition, jurisdiction is invoked under Sections 1254(1) and 2101(c) of the Judicial Code.

STATEMENT OF FACTS.

The facts are stated in the petition.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that Internal Revenue Code Section 23(a)(1)(A) bestows power upon the Commissioner to pass upon the "reasonableness" of compensation paid by an employer.
2. In holding that a payment, conceded to be compensation and paid in good faith pursuant to a plan which has been in effect for many years, may be disallowed.
3. In holding that whether compensation paid is "reasonable" may be determined upon the basis of (a) the source of the earnings, (b) the need of the United States for revenue, or (c) upon a different rule in wartime.
4. In affirming, and refusing to reverse, the decision of the Tax Court.

ARGUMENT.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

This case raises questions of major importance, never passed upon by this Court. They are questions of first impression.

I. DOES THE STATUTE BESTOW POWER?

Originally the statute, which now is Internal Revenue Code Section 23(a)(1)(A), authorized deduction, in computing taxable income, of "*All* the ordinary and necessary expenses"[1] of a business, thus including compensation payments.

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[1] The provision appeared in the Act of October 3, 1913, Section IIG(b). It was carried into the Revenue Act of 1916, Section 12(a), was repeated in the Revenue Act of 1918, Section 234(a)(1), and was carried forward into all subsequent Revenue Acts until codified in Internal Revenue Code Section 23(a)(1)(A).

At that time there was no power to disallow a payment conceded to be compensation. While the Government could, of course, disallow a payment if it in truth were not compensation, it was settled that the Government had no right "to inquire into and determine whether the amounts thereof are proper, that is, whether they are too much or too little."[2] *United States v. Philadelphia Knitting Mills Co.* (3 C. C. A., 1921), 273 Fed. 657, 658.

In the Revenue Act of 1918 the statutory language was changed. To the already existing provision for deduction of "*All* the ordinary and necessary expenses," was added the provision:

> "including a reasonable allowance for salaries or other compensation for personal services actually rendered."[3]

Why was the change made? Was it intended thereby to limit compensation payments to sums the Commissioner should consider "reasonable"? If it was, this would be a tremendous power—to say what the workman shall be paid—to vest in *any* administrator.

Dean Griswold has demonstrated that the change had no such purpose.[4]

The change was not designed to authorize the Commissioner to substitute his judgment for that of the taxpayer as to what he should pay where the sum paid was, in truth, compensation paid in good faith. It was designed

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[2] This, likewise, was the official view of the Treasury. Thus, in T.D. 2696, issued April 10, 1918, prior to the change in the statute, it was said:

> "The test of deductibility in the case of compensation payments is **whether they are in fact payments purely for services** or include some other element."

[3] 40 Stat. 1057. The provision for "including a reasonable allowance" appears in Section 234(a)(1) relating to corporations, and Section 214(a)(1) relating to individuals.

[4] NEW LIGHT ON "A REASONABLE ALLOWANCE FOR SALARIES," 59 Harvard Law Review 286. See also THE DEDUCTION OF "A REASONABLE ALLOWANCE FOR SALARIES"—THE UNDEFINED POWER OF THE COMMISSIONER, 56 Harvard Law Review 997.

to provide a statutory basis for the practice the Commissioner, without statutory authority, had established of making a "reasonable *allowance*" for compensation where none had been paid, as was often the case in small family businesses. The practice, although without statutory basis, was formalized in Regulations 41, Art. 39, which specified, in almost exactly the language later written into the statute:

> "An individual carrying on a trade or business * * * may in computing the net income * * * deduct *a reasonable amount* designated by him *as salary or compensation for personal services actually rendered* * * *."[5]

The purpose, as the Committee on Appeals and Review, the predecessor of the Board of Tax Appeals, now the Tax Court, pointed out in A. R. R. 6087, III—1 C. B. 128, 129:

> "**was to recognize the unfortunate and inequitable position** in which many partnerships had been placed * * *. * * * it has been the practice of the Income Tax Unit to allow a reasonable amount for partners' salaries for the year 1917, **even though none were actually paid** and no agreement existed for the payment thereof.
>
> "It is the opinion of the Committee that the *intent* of the * * * regulations, was to permit * * * a reasonable amount * * * for services actually rendered, *even though* no agreement for the payment thereof was in existence during the said year and *no payments* of salaries [had been] made."

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[5] The Regulation was issued under the Excess Profits Tax Law of World War I, under which net income was determined on the same basis as in the Revenue Act of 1916. This provision for deduction of a reasonable amount for salaries, even though not paid, was extended to individuals by Regulations 41, Art. 39, and to partnerships by Regulations 41, Art. 32, and was available also to corporations "even though the full amounts had not been formally voted as salaries" as is shown by Item 51 of the Excess Profits Tax Primer published by the Bureau of Internal Revenue in 1918.

Similarly, in *Gottlieb Bros.* (1925), 1 B. T. A. 684, where only nominal expense money had been paid, allowance for salaries was made under this Regulation, although the taxpayer (p. 685)

"had no agreement for the payment of salaries or compensation for their services."

The Board said (p. 686):

"The regulation quoted seems to us reasonable and proper * * *. It certainly does justice where a strict application of the letter of the statute would do grave injustice. It has been regularly and consistently applied by the Commissioner * * *."

Before the change was made in the statute, this practice of making a reasonable allowance for salaries even though none had been paid was well established.[6]

Manifestly, all that Congress intended when it wrote into the statute the provision for "a reasonable allowance" for salaries was to supply a statutory basis for the practice which the Commissioner, without statutory authority, had established as a matter of fairness and equity. That the change was not designed to give the Commissioner a revisory power over compensation payments generally is apparent from:

1. The legislative history. The House Committee reporting the bill (H. R. Rep. No. 767, 65th Congress, 2nd Sess.) said:

"the bill [with the language here in question included in it] allows *the same deductions* from gross income as under existing law"

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[6] See, for example, *Elmer Whitehill* (1929), 16 B. T. A. 927, and *W. W. Martin* (1928), 12 B. T. A. 1385, holding that where such deduction is allowed to the employer—where no compensation, or only nominal compensation, had been paid—the employee concerned would be taxed as though such sums in fact had been paid, and *Scheuer v. United States* (Ct. Cl., 1937), 21 F. Supp. 116, certiorari denied 305 U. S. 626, holding that where compensation in fact had been agreed upon, and paid, an additional deduction then would not be allowed.

with certain enumerated exceptions not here important. The Senate Finance Committee (S. Rep. No. 617, 65th Cong., 3rd Sess.) did not disagree, nor did the Conference Committee (H. R. Rep. No. 1037, 65th Cong., 3rd Sess.), nor was anything said in the debates on these sections of the bill in the House (56 CONG. REC. 10234, 10236, 10356, 10408 to 10430), or in the Senate (57 CONG. REC. 296 *et seq.*, and 57 CONG. REC. 301, 554, 560 *et seq.*), to indicate that anyone supposed the Commissioner's power would be enlarged by insertion into the statute of the language here in question.

Indeed, it would be strange for a Congress, which as Dean Griswold has pointed out, 56 HARVARD LAW REVIEW 997, 1000, "has always resisted any effort to put a fixed limit on salary payments" to bestow so vast a power upon the Commissioner as here is claimed, *without saying expressly that it was changing the law.*

2. The language of the statute. In the light of its setting, the language in which the Congress wrote the provision is precisely that which it would have used had it intended to formalize an existing practice; it is language it would *not* have used had it intended to bestow the power the Commissioner has come to exercise thereunder. Looking to the words used:

First, note that Congress opened the clause with the word "including." Choice of the word "including" demonstrates an intent to allow something additional. Had Congress intended a limiting office for the clause, it would have said:

> "**but not including** more than a reasonable allowance for salaries or other compensation."

Congress did *not* say so. Instead, to the already existing provision for deduction of "All * * * expenses" it *specified that something else be added.* That is why it used the word "including."

Second, note that Congress directed that "All" expenses be allowed *if* "paid or incurred," whereas when it wrote the provision for the additional "allowance" it *refrained* from writing in the requirement that the salaries, for which the allowance was to be made, must be "paid or incurred." If what Congress intended to grant was a deduction in "reasonable" amount where no compensation had been paid, it obviously would leave out of this provision—as it did—the requirement that such amount be "paid or incurred."

Third, note that Congress, in authorizing deduction of expenses "paid or incurred," did *not* impose a requirement that they be "reasonable." There would be no occasion for such limitation. If the payment were in fact a part of the "expenses," and if in fact "paid or incurred," that would be enough to warrant deduction.[7] On the other hand, in the case of services rendered but not paid for, there being no other measure, it would be natural that the deduction be limited to a "reasonable allowance."

Fourth, note the use of the word "**allowance.**" Obviously, what the Congress had in mind was not an expense incurred but an item for which an *"allowance"* should be made.

Fifth, note that Congress did not speak of "reasonable salaries"; it spoke of a "reasonable *allowance.*" The Commissioner has no right to move words from one point to another, and certainly not when that brings about a change of meaning; he is bound to take the statute as Congress wrote it.

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[7] Thus, it has been held that the Commissioner *has no power* to disallow, for example, a rent payment on the ground that the sum paid was "unreasonable." *Stanley Imerman* (1946), 7 T. C. 1030. If, however, what purports to be rent, is in fact not such, it may be disallowed. *Iron City Industrial Cleaning Corp.* (1947), 6 TCM 1,237, CCH Dec. 16,143(M).

Sixth, note that the allowance is to be made for services "*actually* rendered." This would appear to be a strange provision to put into a statute if what was in mind was a limitation of the deduction for services generally. Congress in the case of other deductions did not say that they must be for services (or goods or other items) "*actually*" rendered or supplied. If, however, what Congress had in mind was an additional deduction where no compensation had been paid it then would be natural, and sensible, to say that the allowance should be confined to services "actually" rendered.

Read in the light of its setting, the pieces fit together in a manner that would not be possible had Congress intended to bestow upon the Commissioner power to substitute his judgment for that of the taxpayer. Read in the light of history, what otherwise seems an awkward and highly unusual use of words, becomes clear and natural. Every word is given its place and made to bear its ordinary meaning.

The answer of the Circuit Court of Appeals to the point that the power is wanting was (R. 154):

> "It runs contrary to the language of the statute, the Treasury Regulations and judicial decisions relevant thereto."

This does not solve the problem. What "the language of the statute" means is the question. The Treasury Regulations, to be sure, assert the power, but the Regulations cannot establish the power if the statute has not granted it. Nor is there solution in "judicial decisions relevant thereto." There are none. No court until now has been called upon to examine the question. No court has.

Now that the question arises it should be answered.

II. IF POWER EXISTS, BY WHAT TESTS IS IT CONTROLLED?

The Regulations appear to say that compensation paid, as here, pursuant to a long-established plan, shall be allowed. Reg. 103, Section 19.23(a)-6(2), says:

> "Generally speaking, if contingent compensation is paid pursuant to a free bargain between the employer and the individual made before the services are rendered [here the bargain, except in the case of Gammel, was made *11 years* earlier, in 1931], not influenced by any consideration on the part of the employer other than that of securing on fair and advantageous terms the services of the individual [it is not here claimed the agreement had any other purpose], it **should be allowed** as a deduction even though in the actual working out of the contract it may prove to be greater [it was not so here; see R. 162-4] than the amount which would ordinarily be paid."

The Tax Court, however, made the test of what was reasonable turn on:

1. **Source of the earnings**, mistakenly supposing that these were (R. 137) "abnormal war profits." They were not (see p. 8, *supra*). They were neither "abnormal" nor were they the product of "war" earnings. The company had none. Congress, moreover, has not made this the test of the taxpayer's deductions.

2. **Need of the United States for revenue**, because, otherwise (R. 138) "the Government, at a time when it needs tax income most vitally, will be unjustly deprived of such income." The tax cannot be made to turn on the nation's need "however great," as this Court had occasion to note in *Louisville Joint Stock Land Bank v. Radford* (1935), 295 U. S. 555, 602, a different case but involving the same monstrous doctrine. Moreover, Congress has not made "need" the test.

3. **A different rule in wartime**, the Tax Court mistakenly supposing (R. 134) that the ordinary tests do not apply. The short answer is that, Congress not having chosen to change the law for taxpayers generally, except through the device of the Renegotiation Act, the Tax Court had not the right to make the change for it.

But for these mistaken views of what the law permits, the Tax Court would have decided the case otherwise. It said as much (R. 133-8).

The Circuit Court of Appeals found in this nothing (R. 154):

> "of which petitioner may complain. The Tax Court was dealing with a question of fact."

To be sure, it was dealing with a question of fact. But to the solution of that problem it applied principles of law which never heretofore have been given the sanction of *any* court.

The Circuit Court of Appeals compounded the error by adding (R. 155):

> "A principal factor in determining the reasonableness of compensation is the amount of compensation paid similar employees engaged in similar industries."

If this is the test to be applied, then, of a certainty, the judgment should be reversed. See R. 161-4.

In any event, before a rule so at odds with the philosophy of free enterprise as the doctrine the Circuit Court of Appeals espoused, that permissible compensation is to be reduced to the dead level of what others pay—and here petitioner has been reduced far below that level (R. 162-4) —is written into law, the question should have the scrutiny of this Court.

The need is the greater since this Court never has had occasion to examine the principles which should control the exercise of so great a power as the Commissioner

has assumed, if, indeed, he has it at all, and which bulks so large in the day-to-day administration of the revenue laws. That guidance is needed, this case shows.

The writ should issue.

Respectfully submitted,

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